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No. 08-1124

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In The

Supreme Court of the United States

REBECCA L. MARCHAND,
Individually and as Personal
Representative of the Estate of Alfred G. Marchand,

Petitioner,

vs.

JOSHUA MARCHAND,

Respondent.

On Petition For A Writ Of Certiorari
To The Supreme Court Of The State Of New Mexico

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Comes now the Respondent, Joshua Marchand, and submits this Opposition to the Petition for Writ of Certiorari:

REASONS FOR DENYING THE WRIT

I. Introduction.

This case involves the distribution **under New Mexico law** of a cash award made by the Special Master of the September 11th Fund to the New Mexico Personal Representative of the Estate of Alfred Marchand, a New Mexico resident, who died September 11, 2001 at the World Trade Center. The Special Master's Award required that the money be distributed in accordance with the law of the decedent's domicile:

> **This award will be paid to the Personal Representative who is legally obligated to distribute the award in accordance with the laws of the decedent's domicile.** The distribution must be based on either an agreement of all potential beneficiaries (if capable of consenting under applicable state law) **or at the direction of a court of competent jurisdiction in**

> **accordance with the law of the decedent's domicile.**" (Record Proper, "RP" 187, App. 1).[1]

Since the issues before the courts of New Mexico involved the interpretation of New Mexico law, i.e., "the law of the decedent's domicile," and since the distribution was made "at the direction of a court of competent jurisdiction in accordance with the law of the decedent's domicile," the Petition should be denied because the Petition raises state, not federal issues.

The Petition should be denied because there is no Federal Question or if there is, it is insubstantial and

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[1] The Award letter follows the requirements of the Federal Regulations. See 28 C.F.R. §104.52:

> **Distribution of award to decedent's beneficiaries.**
>
> **The Personal Representative shall distribute the award in a manner consistent with the law of the decedent's domicile or any applicable rulings made by a court of competent jurisdiction.** The Personal Representative shall, before payment is authorized, provide to the Special Master a plan for distribution of any award received from the Fund. Notwithstanding any other provision of these regulations or any other provision of state law, in the event that the Special Master concludes that the Personal Representative's plan for distribution does not appropriately compensate the victim's spouse, children, or other relatives, the Special Master may direct the Personal Representative to distribute all or part of the award to such spouse, children, or other relatives.

certainly of no national interest;[2] second, Petitioner failed to timely raise and thus properly preserve in the New Mexico Courts the issues she raises herein and she consequently could not comply with this Court's rules showing where or when the matters were raised; third, the claim that the Special Master's Final Report conflicts with the decision of the New Mexico Supreme Court is erroneous.

ARGUMENT

Point I. The New Mexico Supreme Court did not decide an important question of federal law because the Court distributed the economic award in accordance with the wrongful death law of the decedent's domicile, New Mexico. Hence certiorari should be denied.

Petitioner complains about the New Mexico Supreme Court's application of its wrongful death law,[3] including collateral source rules, to the

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[2] Petitioner admits this is the only case in the United States to adjudicate a distribution. (Petition, p. 30)

[3] The Award reads "Awards from the Fund include three general components: **1) compensation for economic loss to be generally distributed according to the wrongful death law of the decedent's domicile**, 2) $250,000 for non-economic harm distributed in accordance with a will, or if there is no will, the intestate law of the decedent's domicile, and 3) a $100,000 non-economic award for each spouse and/or dependent. The Fund must also deduct "collateral sources" from the award, which includes life insurance, pension funds, death benefit

(Continued on following page)

determination of the amount of the economic loss distribution to herself and Joshua Marchand, the son of the deceased.

This is not a "Federal Question," much less an "important question of federal law that has not been, but should be, settled by this Court . . . ." (Supreme Court Rule 10(c)). The unanimous New Mexico Supreme Court properly acted to distribute the award in accordance with the terms of the Special Master's Award and federal regulations, both of which required that the award be distributed, "in a manner consistent with the law of the decedent's domicile."[4]

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payments, and payments by Federal, State, or local governments related to the terrorist-related aircraft crashes of September 11, 2001." (RP 240)

[4] See 28 C.F.R. §**104.52**. "The Personal Representative shall distribute the award **in a manner consistent with the law of the decedent's domicile** or any applicable rulings made by a court of competent jurisdiction . . . ."

> The Special Master reiterated this requirement in his Award of June 24, 2004 to Rebecca Marchand stating: **This award will be paid to the Personal Representative who is legally obligated to distribute the award in accordance with the laws of the decedent's domicile.** The distribution must be based on either an agreement of all potential beneficiaries (if capable of consenting under applicable state law) **or at the direction of a court of competent jurisdiction in accordance with the law of the decedent's domicile . . . Generally, collateral offsets should first be applied to the share of the individual who received the benefit. Any excess benefit should be applied to the remaining shares of the award. However, pursuant to an**

(Continued on following page)

Neither interpretation of New Mexico law nor even the Award, even if erroneous, is an "important federal question."

As stated at 23 Moore's *Federal Practice 3D* §510.41[3], "The importance of an issue is not necessarily measured by its impact on the litigants, but its contribution to the development of national law . . . ." In the instant action, there is no impact of the New Mexico Supreme Court's decision on national law because the Fund no longer exists.

This Court explained in *Rice v. Sioux City Memorial Park Cemetery,* 349 U.S. 70, 74, 75 S. Ct. 614, 616 (1955) that, "A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants." In the case at bar, there is no national interest in the outcome of this case, only the litigants' interests.

According to 23 Moore's *Federal Practice 3D* §510.04, the Courts' jurisdiction over appeals from a state court decision is limited to those cases in which "a **substantial** federal question was **duly raised** and **adjudicated** and the judgment does not rest on adequate nonfederal grounds."

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agreement of the parties or court order, a reallocation of collateral offsets may be appropriate under the circumstances." (App. 1-2 and 4)

In the instant action, no substantial federal question was duly raised or adjudicated. Hence, this Court does not have jurisdiction. The only argument that a federal question was raised is that since the Special Master was appointed pursuant to federal law, his decision raises an important question of federal law.

But the Special Master's award and the regulations that control the distribution of the proceeds of the award state that, "The Personal Representative shall distribute the award in a manner consistent with **the law of the decedent's domicile or any applicable rulings made by a court of competent jurisdiction** . . . ."[5] That is not a federal issue.

Additionally, the award's distribution is pursuant to an "applicable ruling made by a court of competent jurisdiction." Again, not an important federal issue and hence the Petition should be denied.

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[5] 28 C.F.R. §104.52.

Point II. The arguments and authorities presented in support of the Petition were not raised in the trial court, the New Mexico Court of Appeals nor even in the New Mexico Supreme Court. As a result, Petitioner did not comply with Supreme Court Rule 14.1(g)(i) because she could not specify, "the stage in the proceedings, both in the court of first instance and in the appellate courts when the federal questions sought to be reviewed were raised; . . . ." It was not until the Motion for Rehearing filed in October, 2008 that Petitioner cited the Special Master's "Final Report" and claimed that it supported or conflicted with the decision of any Court and required that Petitioner receive one-half of the economic award. Hence certiorari should be denied.

In 23 Moore's *Federal Practice 3D* §510.41[3][e][ii] it is stated: "As a rule, the Court will not grant certiorari to decide an issue that was not raised in the proceedings below – irrespective of its general significance or novelty . . . ."

No argument or authority cited in the Petition was raised in the trial court, the New Mexico Court of Appeals or even the Supreme Court of New Mexico until the Motion for Rehearing was filed in the New Mexico Supreme Court and then the only authority mentioned was the Final Report. At that stage, whatever issue the Final Report may create was not timely raised. Because Petitioner failed to timely and

properly raise a "Federal Question," this Court should deny the Petition.

Petitioners' argument as set out in her Questions Presented[6] claims a "conflict in legal authority" between the New Mexico Supreme Court's decision and the Special Master's "Final Report." However, this argument was not timely raised in the lower courts.[7] The so-called "Chevron deference" argument was never raised by Petitioner at any time prior to

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[6] " . . . Whether the conflict in legal authority between **the Final Report of the Special Master of the September 11th Victims Compensation Fund of 2001** containing the record of his consistent administrative law decisions based upon federal regulations and his administrative law policy and precedent that *no surviving spouse is to receive less then one-half of the award for economic loss,* and whose authority was confirmed in *Schneider v. Feinberg,* 345 F.3d 135 (2nd Cir. 2003) should be given *Chevron* deference to uphold the rulings of the Special Master of the September 11th Victims Compensation Fund; thereby, reversing the New Mexico Supreme Court's decision in *Marchand v. Marchand,* 2008-NMSC-065, 199 P.3d 281 (N.M. 2008) which eliminated the Fund award to the surviving spouse." (Pet., p. i.)

[7] Petitioner disingenuously claims that the New Mexico Supreme Court ignored the Final Report. See Petition, p. 11, "Somehow the New Mexico high court ignored the Final Report of the Special Master and all other sources which confirmed that no surviving spouse should be awarded less than one-half (1/2) of the economic loss portion of the September 11th Victim Compensation Fund Award. See U.S. Department of Justice, Kenneth R. Feinberg, Esq., Special Master "*Final Report of the Special Master for the September 11th Victim Compensation Fund of 2001*, Vol. 1 (2004) ('Final Report')." **Petitioner never claimed the Report as legal authority** until she filed her Petition for Rehearing in October, 2008.

the instant Petition and is simply an attempt to create an important federal question.

Furthermore, the Petition completely violates Supreme Court Rule 14.1(g)(i) which requires *inter alia* that the Petitioner specify the stage of the proceedings when the matters were raised with "pertinent quotation of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears . . . .":[8]

> If review of a state-court judgment is sought, specification of the stage in the proceedings, **both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotation of specific portions of the record or summary thereof, with specific references to the places in the record where the matter appears** (e.g., court opinion ruling on exception, portion of court's charge and exception thereto, assignment of error) **so as to show that the federal question was timely and properly raised and that this Court has jurisdiction** to review the judgment on a writ of certiorari . . . ."

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[8] See Petition, pages 7-9.

Petitioner failed to comply with any portion of Rule 14.1(g)(i). Why? Because the matters now raised in the first Question (i.e., the Special Master's Final Report), were never raised below until a Motion for Rehearing after the decision of the New Mexico Supreme Court. Even then, the so-called "Chevron deference" claim was not raised or argued.

The claims made in Questions Two and Three of the Petition were never raised at any time. Question Two is completely fallacious. At no time did any court or Respondent state that Federal Regulations do not have the force of law. In fact, Respondent claimed that Federal Regulations and the Special Master required that the award be distributed "in accordance with the law of the decedent's domicile."

Question Three is also fallacious. The Supreme Court did not ignore any ruling of the Special Master. The Supreme Court implemented the Special Master's Award by distributing "the award in accordance with the law of the decedent's domicile." Petitioner never argued that the Special Master's award nor the accompanying federal regulations required that she be given one-half of the Award. She argued that New Mexico community property and wrongful death law required that she be awarded the money.[9] The

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[9] Petitioner's Brief before the Supreme Court stated the issues as follows:

> A. *STATEMENT OF THE ISSUES* 1. THE DISTRICT COURT PROPERLY ENTERED SUMMARY JUDGMENT CONFIRMING THE AWARD OF THE SPECIAL

(Continued on following page)

Chevron doctrine was never mentioned in the lower courts. Petitioner is inventing a federal question and ignoring the record and this Court's Rules.

Because the matters now raised were not raised below, Petitioner did not comply with Supreme Court Rule 14.1(i)(v) requiring an Appendix sufficient to show that the matters were raised below. See Rule 14.1(g)(i).

Even the claimed significance of the Final Report which was raised in her Motion for Rehearing was untimely under New Mexico law because it was not raised in the lower courts or in her Brief before the Supreme Court. See NMRA 1-046 and NMRA 12-216 and NMRA 12-404. The arguments and authorities now raised were available to be raised in the trial court at least sixteen months before its decision and four years prior to the decision of the New Mexico Supreme Court. The Final Report was not raised because it is a report, not a regulation and it does not conflict with the decision below.

On June 24, 2004, the Special Master made an award to the Personal Representative of the Estate

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MASTER OF THE SEPTEMBER 11TH VICTIMS COMPENSATION FUND AND DISTRIBUTING THE AWARD IN ACCORDANCE WITH THE LAW OF DECEDENT'S DOMICILE. (1) *Economic Damages as Community Property* (2) *Economic Damages Distributable Under the Wrongful Death Statute*

(Pages 7, 10-11 of Petitioner's Brief before New Mexico Supreme Court.)

of Alfred Marchand. (RP 187, App. 1) The award expressly states that it is to be "paid to the Personal Representative who is legally obligated to distribute the award in accordance with the laws of the decedent's domicile." (Id.)

On July 19, 2004, Joshua Marchand filed a verified complaint for injunctive relief alleging that the Personal Representative, Rebecca Marchand, had threatened to take the proceeds from the September 11th fund and distribute them entirely to herself and her son, Trae Hale, in violation of New Mexico law, the Special Master's Award and federal regulations. (RP 1)

On August 10, 2004, the District Court entered an order in which the informal probate was removed from the Otero County Probate Court to the District Court and continued as a supervised administration. (RP 122-123)

The Special Master issued his Report of Activities cited by Petitioner in Question One and throughout the Petition **on November 18, 2004. Seven months later**, cross motions for summary judgment were filed by the parties (RP 162 and 227), Joshua Marchand's filing on June 3, 2005 and Rebecca Marchand's on July 12, 2005. On August 12, 2005, Rebecca Marchand filed her Reply to Joshua Marchand's Response to her Motion for Summary Judgment. The "Final Report" of the Special Master was never mentioned.

On March 21, 2006, some seventeen months after the Special Master's "Final Report," the trial Court entered summary judgment. (RP 320) The following uncontested facts were submitted to the trial court by Joshua Marchand in support of his Motion for Summary Judgment.

1. Joshua Marchand is the natural son of Alfred G. Marchand, deceased. Joshua Marchand resides in and is domiciled in Alamogordo, Otero County, New Mexico. (RP 1 and RP 163, ¶ 1, RP 203)

2. Rebecca L. Marchand is the widow of Alfred G. Marchand, and the Personal Representative of the estate of Alfred G. Marchand. Rebecca L. Marchand resides in and is domiciled in Alamogordo, Otero County, New Mexico. CCP 75-01. (Id. ¶ 2, RP 82, 163, 203)

3. Alfred G. Marchand was a resident and domiciled in Alamogordo, Otero County, New Mexico until his death on September 11, 2001. Alfred G. Marchand was an occupant of an airplane that crashed into the World Trade Center. (Id. ¶ 3, RP 82, 163, 203)

4. On September 17, 2001, Rebecca Marchand filed an Application for Informal Appointment of Personal Representative (No Will) in the Probate Court of Otero County, New Mexico, CCP-75-01, and was appointed Personal Representative. Letters of Administration reciting that there was no will were issued that same day to Rebecca Marchand. (RP 24, 82, 85, 90)

5. On July 19, 2004, Joshua Marchand filed his complaint. (RP 1)

6. On August 10, 2004, the District Court ordered that the probate be removed to the District Court. (RP 122)

7. On June 24, 2004, Rebecca Marchand, as Personal Representative of the Estate of Alfred G. Marchand was awarded $1,847,969.88 reduced for collateral offsets for amounts she and her son received of $1,035,498.00, further reduced by $25,000 received by the Estate of Alfred G. Marchand and further reduced by the sum of $17,500.00 which Joshua Marchand received to a net Award of $769,971.88. See Award dated June 24, 2004 from Kenneth R. Feinberg, Special Master, September 11th Victim Compensation fund, attached hereto. (RP 164, 187, App. 1)

8. Rebecca L. Marchand received non-charitable benefits in the amount of $1,077,998.00 from the death of Alfred G. Marchand. Her son, Trae Hale, received non-charitable benefits of $23,177.00. Joshua Marchand, Alfred G. Marchland's natural son, received $17,500.00. (RP 164 ¶ 5)

9. The Special Master ordered that:

> **This award will be paid to the Personal Representative who is legally obligated to distribute the award in accordance with the laws of the decedent's domicile.** The distribution must be based on either an agreement of all potential beneficiaries (if

> capable of consenting under applicable state law) or at the direction of a court of competent jurisdiction **in accordance with the law of the decedent's domicile**. (RP 187, App. 1)

10. Exhibit A to Compensation Form for Deceased Victims signed by Rebecca L. Marchand, Personal Representative states in part:

> The rules that govern the Victim Compensation Fund state that **only one claim may be filed in connection with the death of a Victim and that the claim must be filed by the Victim's Personal Representative.** The rules also state that any award from the Victim Compensation Fund shall be paid to the Personal Representative and that **the Personal Representative is required to distribute the award among the Victim's beneficiaries in accordance with the laws of the Victim's domicile.** (RP 189)

11. In the final submission to the Victim Compensation Fund, (a portion of the September 11th Victim Compensation Fund Compensation Form for Deceased Victims) Certification of Distribution Plan which was signed by Rebecca L. Marchand as the Personal Representative she states:

> **I hereby agree to distribute any award in a manner consistent with the law of the decedent's domicile or any applica ble ruling by a court of competent ju risdiction or as directed by the Special**

> **Master.** I understand that the final distribution plan may differ from the plan proposed in Part II J.

12. The Special Master ordered that the Economic Loss portion of the award, $1,397,969.88 be **"distributed according to the wrongful death law of the decedent's domicile."** (RP 187, App. 1)

13. The Special Master ordered that the Non-economic Loss portion of the award, $250,000 be distributed **"in accordance with a will, or if there is no will, the intestate law of the decedent's domicile."** (RP 187, App. 1)

14. The Special Master further ordered a Non-economic Loss award of $100,000 for each spouse and/or dependent. (RP 187, App. 2)

15. The Special Master further ordered that **"collateral offsets should first be applied to the share of the individual who received the benefit. Any excess benefit should be applied to the remaining shares of the award. However, pursuant to an agreement of the parties or court order, a reallocation of collateral offsets may be appropriate under the circumstances."** (RP 188, App. 4)

16. The Special Master found collateral offsets in the amounts set out in paragraphs seven and eight (7 & 8) above.

From these facts[10] and as required by the Special Master's Award, the New Mexico Supreme Court applied New Mexico law and awarded $100,000 to Rebecca Marchand, $100,000 to Trae Hale, and the remainder of $569,971.88 to Joshua Marchand. The non-economic award was $250,000 and the economic award was thus $319,971.88 ($569,971.88 minus $250,000). Because of collateral offsets of more than one million dollars ($1,077,998.00) received by Rebecca Marchand she was not entitled to one-half of the economic award, $159,985.94. This decision was in strict accordance with both the Special Master's Award and New Mexico wrongful death law.[11]

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[10] Rebecca Marchand did not set out any additional facts in any Court that are relevant to the instant Petition. See Rebecca Marchand's Supreme Court Answer Brief, pages 2-3.

[11] See footnote 15 and *Marchand v. Marchand*, 199 P.3d 281, 286 (N.M. 2008): {25} We disagree that the Special Master's language has no effect on the award distributions. **A plain reading of this language indicates a directive to the Personal Representative to be followed in calculating the appropriate distribution of the remaining award among the beneficiaries.** We also note that the Special Master's letter provided a breakdown of collateral offsets, showing the amount of collateral benefits attributable to each individual beneficiary – $1,012,321 to Rebecca, $25,000 to the Estate, $23,177 to Trae, and $17,500 to Joshua. This breakdown, taken in conjunction with the language directing that collateral offsets "should first be applied to the share of the individual who received the benefit," persuades us that the Special Master intended that individual collateral offsets should be applied as an offset to individual awards. **If that were not the Special Master's intent, there would seem to be no reason to set forth a breakdown of collateral benefits individually, as opposed to just one lump-sum award.**

Until the instant Petition, the *Chevron* decision was not cited in any Court nor was its rationale urged upon any previous court. According to 22 Moore's *Federal Practice 3D* §406.05[3][c][A], "A petitioner who fails to comply with rules prescribing how contentions are to be brought to a state court's attention will not be able to obtain Supreme Court review . . . ."

Pursuant to NMRA 12-216 and 12-404, the questions now raised in the instant Petition were not preserved for review in the New Mexico appellate courts because prior to the motion for rehearing filed in the Supreme Court of New Mexico in October, 2008, Petitioner, Rebecca Marchand did not claim that the Final Report modified the Award of June 24, 2004.

Having lost on the theory she advanced in all lower courts, i.e. that New Mexico community property law required that she receive the entire economic award. (See appendix, A-44 ¶ 6), Petitioner can not change her theory of the case, to claim that a "Final Report" issued November 18, 2004, five (5) months after the June 24, 2004 Award modified the Award.

Nor did Petitioner timely raise the Final Report when she first made the claim in the New Mexico Supreme Court in a Petition for Rehearing filed more than four years after the Report was issued.

NMRA 12-404 entitled Rehearings, provides that the movant show the court, "the points of law or fact which in the opinion of the movant the court has overlooked or misapprehended . . . ." A court cannot overlook or misapprehend a matter that was never raised at any time in the proceeding. See *State v.*

Curlee, 98 N.M. 576, 579, 651 P.2d 111, 114 (N.M. App. 1982):

> **Additionally, it has been an unwavering rule in this jurisdiction for almost seventy years that new points may not be presented in a petition for rehearing.** *Dow v. Irwin*, 21 N.M. 576, 157 P. 490 (1916). *See also Weese v. Stoddard*, 63 N.M. 20, 312 P.2d 545 (1956); *Lea County Water Co. v. Reeves*, 43 N.M. 221, 89 P.2d 607 (1939); *In re White's Estate*, 41 N.M. 631, 73 P.2d 316 (1937); *Ellis v. Citizen's Nat. Bank*, 25 N.M. 319, 183 P. 34 (1919). As the court noted in *Reeves, supra*, when a petitioner for rehearing has had several opportunities to challenge the sufficiency of the record to reflect the happenings at trial and has not availed himself of those opportunities either at trial or during the course of the appeal, **it is too late on the motion for rehearing to expect the reviewing court to become involved in considering a contention of fact not appearing in the record or transcript presented.**
>
> Excerpt from *State v. Curlee*, 98 N.M. 576, 579, 651 P.2d 111, 114 (N.M. App. 1982)

The arguments made in the Petition for Certiorari having never been timely raised below, should not now be considered by this Court. According to 22 Moore's *Federal Practice 3D* §406.05[3][c][iii][A], "The Court will refuse to address an issue raised in the state supreme court brief because the state appellate

courts generally do not consider issues raised for the first time on appeal." Citing *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3, 103 S. Ct. 2296, 76 L. Ed. 2d 497 (1983). See also *Stembridge v. Georgia*, 343 U.S. 541, 547, 72 S. Ct. 834, 96 L. Ed. 1130 (1952).

At 22 Moore's *Federal Practice 3D* §406.05[3][a][i] the requirement that the federal issue be specially set up or claimed is discussed:

> Section 1257 provides for Supreme Court certiorari review of cases in which either: the validity of a federal treaty or statute or of a state statute seen as repugnant to federal law is 'drawn in question'; or in which any title, right, privilege or immunity is 'specially set up or claimed' under federal law. **The terms 'drawn in question' and 'specially set up or claimed' require not only that the issue be brought up but that it be brought up expressly and at the right time.** Most recent Court cases generally require that the issue either be 'pressed or passed upon': **either raised by the petitioner in the appropriate way and time** or actually decided by the appropriate Court or both.
>
> "[C]omity to the States, and . . . a constellation of practical considerations" cause the Court to review only issues that state courts have passed or pressed upon.

This Court's decision in *Adams v. Robertson* 520 U.S. 83, 86-92, 117 S. Ct. 1028, 1029-1032

(U.S. Ala. 1997) describes the requirement that the issues be previously presented to the state courts:

> With "very rare exceptions," *Yee v. Escondido,* 503 U.S. 519, 533, 112 S.Ct. 1522, 1531, 118 L.Ed.2d 153 (1992), **we have adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review.** See *Heath v. Alabama,* 474 U.S. 82, 87, 106 S.Ct. 433, 436-437, 88 L.Ed.2d 387 (1985); *Illinois v. Gates,* 462 U.S. 213, 217-219, 103 S.Ct. 2317, 2321-2322, 76 L.Ed.2d 527 (1983); *McGoldrick v. Compagnie Generale Transatlantique,* 309 U.S. 430, 434, 60 S.Ct. 670, 672, 84 L.Ed. 849 (1940). As petitioners concede here, the Alabama Supreme Court did not expressly address the question on which we granted certiorari. See Reply Brief for Petitioners 2-3, n. 1.
>
> [3] **Nor have petitioners met their burden of showing that the issue was properly presented to that court. When the highest state court is silent on a federal question before us, we assume that the issue was not properly presented,** *87 *Board of Directors of Rotary Int'l v. Rotary Club of Duarte,* 481 U.S. 537, 550, 107 S.Ct. 1940, 1948, 95 L.Ed.2d 474 (1987), **and the aggrieved party bears the burden of defeating this assumption,** ***ibid.,*** **by**

demonstrating that the state court had "a fair opportunity to address the federal question that is sought to be presented here," *Webb v. Webb,* 451 U.S. 493, 501, 101 S.Ct. 1889, 1894, 68 L.Ed.2d 392 (1981). We have described in different ways how a petitioner may satisfy this requirement. See *Street v. New York,* 394 U.S. 576, 583-585, 89 S.Ct. 1354, 1361-1362, 22 L.Ed.2d 572 (1969). In some cases, we have focused on the need for petitioners either to establish that the claim was raised "'at the time and in the manner required by the state law,'" *Bankers Life & Casualty Co. v. Crenshaw,* 486 U.S. 71, 77-78, 108 S.Ct. 1645, 1650, 100 L.Ed.2d 62 (1988) (quoting **1030 *Webb, supra,* at 501, 101 S.Ct., at 1894), see, *e.g., Exxon Corp. v. Eagerton,* 462 U.S. 176, 181, n. 3, 103 S.Ct. 2296, 2301, n. 3, 76 L.Ed.2d 497 (1983); *Beck v. Washington,* 369 U.S. 541, 549-554, 82 S.Ct. 955, 959-963, 8 L.Ed.2d 98 (1962), or to persuade us that the state procedural requirements could not serve as an independent and adequate state-law ground for the state court's judgment, see, *e.g., Hathorn v. Lovorn,* 457 U.S. 255, 262-265, 102 S.Ct. 2421, 2426-2428, 72 L.Ed.2d 824 (1982). **In other cases, we have described a petitioner's burden as involving the need to demonstrate that it presented the particular claim at issue here with "fair precision and in due time,"** *New York ex rel. Bryant v. Zimmerman,* 278 U.S. 63, 67, 49 S.Ct. 61, 63, 73 L.Ed. 184 (1928); *PruneYard Shopping*

> *Center v. Robins,* 447 U.S. 74, 85, n. 9, 100 S.Ct. 2035, 2043, n. 9, 64 L.Ed.2d 741 (1980). See generally 16B C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4022, pp. 322-339 (1996).
>
> But however we phrase our requirements, petitioners here have failed to satisfy them. **Petitioners have done nothing to demonstrate that they complied with the applicable state rules for raising their federal due process claim before the Alabama Supreme Court, or to explain why the failure to *88 comply with those rules would not be an adequate and independent ground for the state court to disregard that claim.**
>
> Excerpt from *Adams v. Robertson*, 520 U.S. 83, 86-92, 117 S.Ct. 1028, 1029-1032 (U.S. Ala. 1997)

As in *Adams*, Petitioner failed to meet her burden to show that the matters raised herein were properly and timely raised in New Mexico courts. Hence the Petition should be denied.

Point III. The Special Master's Report does not alter the decision of the New Mexico Supreme Court because it does not conflict with the Award.

The purpose of the September 11th Fund was to provide compensation to the "relatives of a deceased individual . . . who was killed as a result of the

terrorist-related aircraft crashes of September 11, 2001." 49 U.S.C. §40101, Title IV, Sec. 403. "The money was to be paid to the 'personal representatives' of those who were killed as a result of the crashes." 28 C.F.R. §104.1. Joshua Marchand is the son of the deceased, a relative.

Even if this Court were to consider the Final Report, the decision made by the New Mexico Supreme Court would not change. The Special Master in his Award dated June 24, 2004 ordered that **"collateral offsets should first be applied to the share of the individual who received the benefit. Any excess benefit should be applied to the remaining shares of the award. However, pursuant to an agreement of the parties or court order, a reallocation of collateral offsets may be appropriate under the circumstances."** (RP 41) The Special Master determined the specific amounts of collateral offsets to be used in making the final distribution. (RP 40) The Special Master knew the amounts of the various components of the Award, the amounts of the collateral offsets and the effects his order would have on the parties.

Petitioner is asking this Court to rewrite the Award by reference not to a law or regulation, but to a post-Award report. There is nothing in the Report indicating that the Special Master intended his Final Report to modify any actual Award. The Final Report is not a law or regulation. Whatever deference it deserves, it does not alter the actual Award.

According to the Report, the Personal Representative had the right to request[12] that the Special Master allocate the award in a manner differently than the manner that the Special Master prescribed. In fact, she did, but not successfully.[13] She was represented by counsel before the Special Master and had the right to make the request. It simply was not granted.

As set forth in the Federal Regulations, 28 C.F.R. §104.52, the Special Master had the power to reallocate the award based upon personal circumstances if he made that conclusion of fact. (See footnote 1) However, in this case, the Special Master did not reallocate the award as Petitioner now wants this Court to do because of a Report issued after the Award.

Additionally, the Final Report does not conflict with the decision of the New Mexico Supreme Court

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[12] "**Where the Personal Representative elected allocation** pursuant to a *Kaiser* formula, ..." fn. 171, p. 93, Final Report of Activities

[13] During the hearing of April 28, 2004 before the Special Master, Rebecca Marchand proposed that the economic loss award be distributed entirely to herself. There is no record of her request to cite to this Court and Joshua Marchand was unaware of her request until she filed her Second Motion to Supplement the Record on Appeal before the New Mexico Supreme Court. (See p. 41, lines 17-20 of attachment to Third Motion to Supplement, transcript of April 29, 2004) That motion was denied because neither the transcript nor the argument was made to the trial court. Nevertheless, no matter what she requested or could have requested, the Special Master delivered his decision in the Award of June 24, 2004. (RP 40-41).

which complied with the Special Master's Award and ordered an offset of the collateral source funds received by Petitioner against the share of the individual receiving the same.

Rebecca Marchand received almost seven times the amount of the economic damages she claims in collateral benefits. She received $1,077,998.00 dollars in collateral benefits. She now claims one-half of the economic award or an additional $159,985.94. She has received seven times more than her claimed one-half of the economic award.

In the case at bar, the Special Master specifically ordered that **"collateral offsets should first be applied to the share of the individual who received the benefit."** (RP 4) The Special Master found specific amounts of collateral offsets to be used in making the final distribution. (RP 40) The Special Master did not make the determination now sought by Petitioner.

In fact, Petitioner in her Motion for Rehearing before the New Mexico Supreme Court admitted that the Special Master did not make the award she now requests from this Court. In her Brief in Support of Motion for Rehearing she states at page 12:

> "**Had this matter been decided by the Special Master**, a dependent surviving spouse, such as Mrs. Marchand, **would be entitled to consideration** from spousal support for the remainder of her life

> resulting in a distribution of at least one-half of the economic recovery."

She makes the same concession at page 30 of her Petition, but now ups the amount of the loss to one hundred percent:

> There can be no doubt that if the Fund were still in existence, the Special Master **would probably** have reallocated and provided the entire amount of economic loss award to the spouse, consistent with the concepts underlying the September 11th Fund.[14]

The New Mexico Supreme Court correctly concluded that it was required to follow the actual Award of the Special Master, apply New Mexico law and deduct the collateral offsets received by Rebecca Marchand from the economic loss award and distribute that amount to the remaining share. Moreover, that Court held that subtracting the collateral benefits from Rebecca's share followed New Mexico law and the Special Master's decision.

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[14] Under New Mexico Court Rules, NMRA 12-502C(2), " . . . **only the questions set forth in the petition will be considered by the Court.**" Rebecca did not file a cross petition for certiorari. See NMRA 12-502D. She did not raise any issue in regard to reexamining the decision of the Court of Appeals in her Response to Petition for Certiorari. Hence all matters ruled upon by the Court of Appeals to which no review was sought in this Court are determined. See *Fikes v. Furst*, 134 N.M. 602, 81 P.3d 545 (N.M. 2003). Rebecca cannot argue now that she is entitled to the entire economic award.

The Special Master's Final Report is a report detailing the activities of the office of the Special Master. There is nothing in the Final Report that indicates that it was intended to be a regulation or that it was intended to alter or modify any Award made by the Special Master or that it was even intended as an interpretative guide; it is simply a report of his activities.

The first sentence of the Report states that the document is a report of activities of the Special Master: "As the Special Master for the September 11th Victim compensation Fund of 2001 (the "Fund"), I respectfully submit this Report detailing the activities of the Fund."

The Final Report is not a rule or regulation or an interpretative guide. It contains no legal or precedential authority. See *Schneider v. Feinberg*, 345 F.3d 135, 145 (2nd Cir. 2003) (public statements by the Special Master, "do not command Chevron deference because they are not binding dispositions that carry the force of law.") This same reasoning applies to the e-mail from Mr. Feinberg which is unpublished, edited by Petitioner, not available to Respondent to review, created without input from Respondent and which states only what he "probably" would have done. (Petition, p. 19)

Even if the Report has some precedential or legal authority, the Report specifically states that the Special Master will only approve plans for distribution that appropriately compensate family members.

("Fairness and the evaluation of individual factors would be accomplished by allowing the Special Master to direct distribution to specific family members if the Personal Representative's proposed plan did not appropriately compensate these relatives.)

In the case at bar, the Special Master's Award did not find any circumstances justifying an award to the widow of a greater proportion of the award. He did determine that **"collateral offsets should first be applied to the share of the individual who received the benefit."**

Furthermore, an examination of the Special Master's Report does not change the decision of the New Mexico Supreme Court. Parts of the Special Master's Report cited by Petitioner are emphasized below. These parts, as will be explained below, show that no change should be made in the New Mexico Supreme Court's determination.

E. Distribution

> The Act's silence regarding the distribution of awards for decedents' claims created a huge vacuum in the administration of the Fund. While the Act was intended to benefit the families of deceased victims, questions regarding which family members should be included in a plan of distribution and how the award should be allocated were left to the Department and the Special Master to resolve. The Regulations and the procedures developed by the Fund attempted to create a mechanism for the allocation of awards that

would be consistent among similarly situated families, efficient, and easy to administer, but would also allow for the consideration of the individual needs of the families. **The Department and the Special Master determined that these goals would be best served by distributing the award in a manner consistent with the law of the decedent's domicile.** Consistency would be assured by authorizing the Special Master to approve or disapprove the plan depending on whether it complied with state law. Efficiency would be served by requiring the Personal Representative to submit a plan of distribution to the Fund for the Special Master's approval, thereby eliminating the involvement of the state courts where the Special Master determined that the plan followed state law. **Fairness and the evaluation of individual factors would be accomplished by allowing the Special Master to direct distribution to specific family members if the Personal Representative's proposed plan did not appropriately compensate these relatives.**

The Regulations require the Personal Representative to distribute the award in a manner consistent with the law of the decedent's domicile or any applicable rulings made by a court of competent jurisdiction. In order to monitor the actions of Personal Representatives in meeting this obligation, the Personal Representative was required to submit a proposed distribution plan to the Special Master.

> **If the distribution plan submitted appeared to be consistent with state law, the Fund approved the plan; if it did not comply with state law, the plan was not approved. In the latter case, the Personal Representative would need to seek a determination from the relevant state court as to the proper distribution of funds.**

As shown by the sentences emphasized, the Special Master based upon fairness and evaluation of individual factors could **"direct distribution to specific family members if the Personal Representative's proposed plan did not appropriately compensate these relatives"** In the instant case, the Special Master did not exercise this power and instead directed that the award be distributed based upon state law.

Additionally above emphasized portions of the Report state that the plan must comply with state law or the Personal Representative would need to seek a determination from the relevant state court as to the proper distribution. The New Mexico Supreme Court is the relevant state court.

In the next portion of the Report cited by Petitioner, the Special Master discusses distribution of the economic portion of the award and describes the rules of distribution in most states concerning

distribution in accordance with pecuniary loss.[15] The Special Master again states that the Personal Representative could submit a plan of distribution that varied from the law of the state of the decedent's domicile. Apparently she did. However, the Special Master did not reallocate the Award as she requested presumably because the Personal Representative received substantial collateral assets of $1,077,998.00 dollars, more than seven times the half of the economic damages she now requests this Court to order.

This portion of the Report reads:

> Unlike wills and state intestacy laws, which delineate the identity of the distributee as well as the portion of the estate the distributee should receive, **the wrongful death law of most states provides that damages should be distributed to those eligible to recover under a state's intestacy law, "in proportion to their pecuniary loss.** "A finding of proportionate "pecuniary loss" often required a court to engage in time-consuming fact-finding. **However, the goal of efficient and speedy resolution of**

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[15] New Mexico wrongful death law does not make awards based upon pecuniary loss, but by relationship with the deceased. See *Leyba v. Whitley*, 120 N.M. 768, 775-776, 907 P.2d 172, 179-180 (N.M. 1995) at ¶ 21, "The legislature has by statute specifically designated a discrete and identifiable class of beneficiaries of any wrongful death claim, and each beneficiary shares equally with the others regardless of what may have been his or her individual pecuniary expectancy in the continued life of the deceased."

claims obviously would not have been served had the Fund regularly engaged in distribution plan hearings to determine the "pecuniary harm" of significant numbers of beneficiaries. In order to avoid this result and provide Personal Representatives and their attorneys with guidance regarding "pecuniary loss," the Fund adopted criteria considered by state courts. **Generally, the Fund determined that the economic portion of a plan of distribution would be approved if the allocation either followed the intestate law of the state of domicile or,** in the case of distribution between a spouse and children, a formula developed by the New York Surrogate's Courts in In re Kaiser Estate that based pecuniary loss on remaining years of dependency. These criteria provided the Personal Representative with some flexibility while still protecting the interests of beneficiaries. For example, **the option** of relying upon the Kaiser formula was particularly helpful to a spouse with older minor children, since under those circumstances the Kaiser formula would provide a larger portion of the economic award to a spouse with many years of remaining dependency than an allocation based on the intestate laws, which usually split the estate equally between a spouse and children.

In some situations, the Fund concluded that certain state laws created potential hardships for claimants by limiting a spouse's share to less than half of the

> economic recovery. To address these circumstances, the Special Master determined that, in the interest of both uniformity and fairness, **it would be appropriate to allow every Personal Representative the option** of utilizing the Kaiser formula for allocation of the economic portion of the award . . . Special Master, Final Report, pages 58-60.

In the instant case the Personal Representative had the option to utilize the Kaiser formula. She did not and whatever her plan of distribution was, the Special Master ordered that **"collateral offsets should first be applied to the share of the individual who received the benefit. Any excess benefit should be applied to the remaining shares of the award."** (RP 41)

Since the Special Master also determined the amount of collateral offsets, (see ¶¶ 7 & 8 above) he knew the result that his order was dictating and he knew that Rebecca Marchand would receive seven times the amount received by Joshua Marchand for economic damages because of her collateral benefits. If the Special Master had intended there be no collateral offsets or that the Personal Representative receive a larger share of the economic damages, the Award would have said that; it did not.

The rules governing the Fund in question and answer fashion state that the Special Master may provide a greater share to a spouse based upon the

facts presented. He simply did not. See Section 3.2 as follows:

> Note: The determination of the Personal Representative is not the same question as the determination of who ultimately will receive the award. **The Personal Representative shall distribute the award in a manner consistent with the law of the decedent's domicile or any applicable ruling made by a court of competent jurisdiction.** However, in order to assure that the families of **needy** Victims receive adequate compensation, the regulations further provide that the Personal Representative shall, before payment is authorized, provide to the Special Master a plan for distribution of any award received from the Fund. Notwithstanding any other provision of these regulations or any other provision of State law, **in the event that the Special Master concludes that the Personal Representative's plan for distribution does not appropriately compensate the Victim's spouse, children, or other relatives, the Special Master may direct the Personal Representative to distribute all or part of the award to such spouse**, children, or other relatives. (RP 314)

In this case, the Special Master did not make the conclusion now requested and direct a larger award to Rebecca Marchand.

Further the Fund recognized that there might be different distributions depending upon the decedent's

domicile. Thus, New York law would not be followed in the case of a deceased from New Mexico. See Section 5.10:

> **If the award distribution is based on State law, will that mean that different distributions will occur depending on where the Victim lived?**
>
> **Yes. It is certainly possible that there will be different distributions schemes in different states.** (RP 315)

The Fund rules also stated that if the Personal Representative believed that the collateral offset would create a hardship, she could request that the Special Master reallocate the collateral offsets.

> Generally, collateral source payments, also known as collateral offsets, will be applied against the share of the individual who received the benefit. Any excess benefit will be applied against the remaining shares of the award. **However, a departure from this general policy may be warranted in certain circumstances. For instance, if the Personal Representative believes that a hardship is created by applying collateral offsets against individual shares, he/she may send a written request to the Special Master for a reallocation of collateral offsets. The Special Master will determine whether a reallocation is appropriate under the circumstances and will advise the claimant accordingly** . . . (RP 315)

In the case at bar, as conceded by Petitioner, the Special Master did not determine to reallocate the collateral offsets.

Point IV. Response to certain misleading claims in the Petition.

In response to certain of the claims made in the Petition, Joshua Marchand states that his participation in the process was limited because as recognized in the Petition, only the Personal Representative could represent the estate before the Special Master. (See Petition, p. 5, 6 and see 49 U.S.C. §40101 Title IV, Sec. 405(c)(3)(A) and 28 C.F.R. §104.2(a)(2)).

Petitioner misrepresents the reasoning of the New Mexico Supreme Court when she states that it based its entire decision on "equitable considerations" (Petition, p. 9) or that "there is only the blue sky behind its decision." (Petition p. 26). The decision is based upon New Mexico wrongful death law and on the Special Master's Award both of which require collateral offsets.[16] The Special Master ordered that

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[16] See fn 4. And see *Marchand v. Marchand*, 199 P.3d 281, 287 (N.M. 2008): {27} Under these circumstances, the Special Master's directive embodies a basic notion of fairness. It seeks to avoid excessive compensation for one beneficiary at the expense of the remaining beneficiaries. ***See, e.g., Strickland v. Roosevelt County Rural Elec. Coop.*, 103 N.M. 63, 64, 65, 702 P.2d 1008, 1009, 1010 (Ct.App. 1984) (holding that the proceeds of a wrongful death award should be divided into equal shares and each beneficiary should reimburse the compensation carrier from his equal share of**

(Continued on following page)

the economic award be "distributed according to the wrongful death law of the decedent's domicile."[17]

Finally, even Petitioner's Conclusion at page 34 takes out of context the statement made by Mr. Feinberg reported at 19 Washington University, *Journal of Law & Policy*, p. 25 entitled: "*Speech: Negotiating the September 11 Victim Compensation Fund of 2001: Mass Tort Resolution without Litigation.*" Petitioner conveniently omitted from her quotation to this Court Mr. Feinberg's statement that it is **state law** that is the deciding factor if the parties could not mediate the matter.

> We worked out almost all of these claims [disputes between claimants]. **Where we could not get an agreement, we did the only sensible thing: we looked to state tort law and the state's estate law of the victim's domicile. If somebody gets killed in an automobile accident in St. Louis, there is law that has been tested to see who takes the money.** That is what we did. Usually half to the spouse and the other half to the children. Same-sex partner?

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the total judgment "the amount of workers compensation benefits received by that beneficiary," and noting that "[t]his makes each beneficiary whole and avoids double recovery by either"). For the purpose of clarity we repeat: Rebecca is not entitled to any of the economic loss component of the award. Joshua is entitled to all of the individual economic loss award.

[17] See footnote 3.

> **Go fight in the surrogates' court if we cannot resolve the dispute.** I cannot be all things to all people. I have got to *move* on this program, and that is how we dealt with this problem.

Petitioner's quote was misleading.

CONCLUSION

The Award issued by the Special Master requires distribution of the award in accordance with the laws of the decedent's domicile, not a federal matter. It also required, as does New Mexico law, the offset of collateral benefits received by Rebecca Marchand of $1,012,321.00 dollars from the economic Award, one-half of which is $159,985.94. Clearly, when Rebecca Marchand has received seven times this amount in collateral benefits, she has in fact received at least one-half of the economic award.

None of the arguments now advanced by Petitioner were timely made in any lower Court and should not now result in the issuance of a Writ.

The Personal Representative had the right and apparently did request that she be given a larger portion of the Award but the Special Master declined the invitation as should this Court.

Wherefore, premises considered, Respondent prays that the Petition be denied.

Respectfully submitted,

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Counsel for Respondent

[LOGO] **U.S. Department of Justice**
September 11th Victim Compensation Fund

P.O. Box 18698
Washington, D.C. 20036-8698

June 24, 2004

REBECCA L MARCHAND
C/O MILTON G. SINCOFF
KREINDLER & KREINDLER
100 PARK AVENUE 18TH FLOOR
NEW YORK, NY 10017
USA

Dear REBECCA L MARCHAND:

Re: Claim for ALFRED G. MARCHAND

This letter serves to notify you that a final award determination has been made by the September 11th Victim Compensation Fund ("Fund"). This award will be paid to the Personal Representative who is legally obligated to distribute the award in accordance with the laws of the decedent's domicile. The distribution must be based on either an agreement of all potential beneficiaries (if capable of consenting under applicable state law) or at the direction of a court of competent jurisdiction in accordance with the law of the decedent's domicile.

Awards from the Fund include three general components: 1) compensation for economic loss to be generally distributed according to the wrongful death law of the decedent's domicile, 2) $250,000 for

non-economic h rm distributed in accordance with a will, or if there is no will, the intestate law of the decedent's domicile, and 3) a $100,000 non-economic award for each spouse and/or dependent. The Fund must also deduct "collateral sources" from the award, which includes life insurance, pension funds, death benefit payments, and payments by Federal, State, or local governments related to the terrorist-related aircraft crashes of September 11, 2001.

Based on the information submitted, the aggregate final award has been determined to be $769,971.88. This award was calculated as follows:

Economic Loss	Non-Economic Loss To Estate	Non-Economic Loss To Spouse/Dependents – $100,000 to each of the following:	Collateral Offsets	Total Amount
$1,397,969.88	$250,000.00	TRAEE HALE, REBECCA MARCHAND	$1,077,998.00	$769,971.88

Generally, collateral offsets should first be applied to the share of the individual who received the benefit. Any excess benefit should be applied to the remaining shares of the award. However, pursuant to an agreement of the parties or court order, a reallocation of collateral offsets may be appropriate under the circumstances. Collateral offsets of $1,077,998.00 were received by the following beneficiaries:

Name of Individual	Relationship to Decedent	Amount of Collateral Offsets
TRAEE HALE	STEP-SON	$23,177.00
JOSHUA MARCHAND	CHILD	$17,500.00
REBECCA MARCHAND	SPOUSE	$1,012,321.00
ESTATE OF ALFRED MARCHAND	ESTATE	$25,000.00
Total		$1,077,998.00

Sincerely,

/s/ Kenneth R. Feinberg
Kenneth R. Feinberg
Special Master
September 11th Victim
Compensation Fund

CC: TRAEE HALE, JOSHUA MARCHAND, NEW MEXICO – PROBATE COURT OF OTERO COUNTY